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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1088

COREX CORPORATION, dba QUICK CORPORATION OF AMERICA
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the petitioner and petitions this Honorable Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, entered on October 7, 1975, which reverses the judgment of the United States District Court, Central Division of California, in favor of the petitioner, and order denying a petition for rehearing dated January 5, 1976.

OPINIONS BELOW

The opinion of the United States District Court is reported in 362 Fed. Supp. 1065, and is attached to this petition as Appendix "A" pages 1-7.

The opinion of the United States Court of Appeals for the Ninth Circuit, infra, page is reported in 524 F.2d 1017, and the opinion is printed in Appendix "B," pages 1-9.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

1. Were the Findings of Fact of the District Court clearly erroneous under Rule 52(a) of Rules of Civil Procedure where the facts found by the District Court were undisputed and supported by substantial evidence?

2. Did the Court of Appeals err in holding that the District Court was required, as a matter of law under Rule 16 of the Federal Rules of Civil Procedure, to pursue issues of fact which were not set forth in the pre-trial conference order?

3. Whether the petitioner, or another firm (Jon H. Importing Company) was the bona fide importer within the contemplation of Title 28 Section 4161 of the Internal Revenue Code of 1954?

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4. Did the substitution of Jon H. Importing Company as the importer, in the place of Corex, the previous importer, alter the tax base so as to avoid the payment of any tax due on the imported fishing tackle?

5. Was Jon H. acting as a mere agent or conduit of Corex as a dummy in order to avoid a higher excise tax?

6. Were there arms-length transactions between the importer and distributor or just a cover-up to avoid taxes?

STATUTE INVOLVED

The statutory provision involved in Section 4161 of the Internal Revenue Code of 1954 (26 U.S.C. §4161, 1964 Ed.).

> "There is hereby imposed upon the sale of fishing rods, creels, reels, and artificial lures, baits, and flies (including parts of accessories of such articles sold on or in connection therewith, or with the sale thereof by the manufacturer, producer, or importer a tax equivalent to 10 percent of the price for which so sold."

STATEMENT

This is an action under 28 U.S.C., Section 1346(a)(1), for the recovery of excise taxes paid, which the Government contends, and petitioner denies, that it is the importer within the meaning of Section 4161 of the Internal Revenue Code of 1954, and subject to a tax of ten percent (10%).

The following facts were undisputed and supported by substantial evidence:

D.A.M.'s principal place of business was in Berlin, Germany, and manufactured fishing reels and lures which were imported into the United States (Cl. T. p. 65) by Anton W. C. Denker,[1] whose place of business was Hamburg, Germany, and was the sole distributor and exporter of D.A.M. fishing tackle (Cl. T. p. 75, Pl. Exs. 4-5 Vol. II 36-38.)

Petitioner (Corex)[3] was a California corporation, with its principal place of business in Costa Mesa, California, and was not owned by D.A.M., but by Phil Greyshock, a 25% stockholder, and by Lutze Kuntze and Rupert Kuntze who, between them, owned the balance of 75% of the issued stock and who had a part interest in D.A.M., which was not a corporation, but an association.

Shortly after its formation, Corex, pursuant to an agreement with Denker, became the importer of D.A.M. fishing tackle (Vol. IV, R.T. pp. 42, 136). Corex continued to be the importer until the summer of 1968, during which time the Gladding Company, a separate unrelated entity, was the distributor of the D.A.M. products.

The Gladding Company decided to get out of the business of distributing the D.A.M. reels and supplies

[1]Anton W. C. Denker hereafter designated as Denker.

[2]Vol. I, R.T. through Vol. IV references are to Reporter's Transcripts. Cl. T. refers to Clerk's Transcripts.

[3]Corex Corporation hereafter designated as Corex.

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because it was going to manufacture a similar product (Vol. III, R.T. p. 137).

Denker, the exporter, who had no financial interest in D.A.M. or the Corex, made the decision to substitute Corex in the place of the Gladding Company as the distributor, and Jon H. Importing Company[4] as the importer in the place of the Corex.

John Nessley formed John H., and was owned by Ruth Nessley, his wife, who was doing business under a fictitious name (C.T. p. 75, Pl. Ex. 15 Vol. II 178).

Under an agreement entered into, dated August 1, 1968, Denker appointed Jon H. the sole and exclusive importer of D.A.M. fishing tackle. The term of the agreement was to be as long as Jon H. provided reasonable and satisfactory performances of importing said product (Pl. Ex. 2, ¶2), Vol. II 26, whose responsibility was to promote and import the D.A.M. products into the United States.

Jon H., after written appointment by Denker, entered into a distributor agreement with Corex, which provided, among other things (Pl. Ex. 1 Vol. II 25.)

(1) Corex shall have first option of D.A.M. fishing products imported by it (Jon H.). However, in the event Corex did not exercise its option, then John H. had the right to sell to the other distributors or outlets (¶ 2).

[4]Jon H. Importing Company hereafter designated as Jon H.

(2) All prices were on the basis of C&F duty and excise tax paid Los Angeles Harbor or Customs warehouse, based on shipment by ocean vessel. If the shipments were by air, air-freight, costs would be added, together with delivery charges from airport to Costa Mesa (¶ 5).

(3) Payment of Jon H.'s invoices were to be made by Corex by a portion on receipt of merchandise and balance as agreed, depending on market conditions and availability of credit (¶ 6).

(4) Neither party had the right to act for or obligate the other (¶ 7).

Corex had no financial interest in Jon H., and exercised no control over Jon H.'s operations, and Jon H. was a separate entity (Vol. II, R.T. p. 122, l. 1 to l. 2, p. 124). There was not any evidence of a change in the tax base effected by the substitution of Jon H. as importer in the place of Corex, nor was there any evidence that the appointment of Jon H. as the importer, in the place of Corex, was motivated for the purpose of avoiding taxes.

The Government never challenged the relationship between Corex, when it was the importer and Gladding, the distributor. The only real difference in the facts here, is that Jon H. was substituted as the importer in the place of Corex, who had been the importer when Gladding was the distributor.

Jon H. established a line of credit with the Crocker

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Bank in the amount of $25,000 by putting up a certificate of deposit in the amount of $10,000 (Pl. Ex. 41, Vol. II, R.T. p. 54, l. 1 to l. 2, p. 96), and had an income of $23,419 and $26,915 in 1968 and 1969 as an employee of the Zerwekh Company, Custom brokers (Vol. III, R.T. p. 85, l. 19 to l. 2, p. 86; of Exs. "A" and "B" Vol. III 165-166.) The amount of capital of Jon H. was not significant, because it had credit from Denker, and its operating expenses were low.

Jon H. subjected and exposed itself to the following risks, among them being:

(1) Liability in the amount of $100,000 on a term bond executed in favor of the United States, in which it was provided under paragraph (1) that in the event of failure to deposit duties and taxes imposed or by reason of importation of the articles he shall pay to the District Director of Customs as liquidated damages in amount equal to the value of the merchandise, plus taxes and duties thereon. Other liabilities for damages were provided in paragraphs (2) and (3) (Pl. Ex. 3 Vol. II 32)

(2) Payment to Denker for the merchandise imported.

(3) Payment of insurance.

(4) Losses not covered by insurance.

(5) Brokerage fees.

(6) Payment of excise taxes and duties.

(7) Warehousing.

(8) Warfage and handling charges.

(9) Change in appraisement of merchandise by Customs, none of which was passed on to Corex.

(10) All other costs and expenses of importation (Vol. II, R.T. p. 98, l. 8 to l. 14, p. 103, l. 22 to l. 6, p. 104, Pl. Ex. 18 Vol. II 194.)

((1) Jon H. filed the Special Customs Invoice Form No. 5515, invoices from Denker to Jon H. and bills of lading showing Denker as the seller and Jon H. as the purchaser (Pl. Ex. 11 Vol. II 156.)

An importer who files these documents with Customs for entry vouches for the truth of these documents, together with all other documents which are required to be filed with each entry.

The presentation of false documents, by whomever prepared, subjects the importer to severe penalties under Section 592 of the Tariff Act of 1930, Title 19, Section 1592, U.S.C.

This is another important risk which subjected Jon H. to both civil and criminal penalties for filing false documents.

Corex had no financial interest in Jon H., and exercised no control over Jon H.'s operations, and Jon H. was a separate entity (Vol. II, R.T. p. 122, l. 1 to l. 2, p. 124).

Jon H. initiated a credit arrangement with Denker

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in order to increase the business by making a greater number of reels available to the market (Vol. III, R.T. p. 41, l. 23 to l. 7 p. 42).

Jon H. ordered from Denker without first consulting Corex by agreeing to accept all of the fishing tackle that Denker would ship. This was done on the basis of an annual projection from Denker of the fishing tackle available. Purchase orders were not issued by Corex to Jon H. until Jon H. had received notification from Denker of the portion of the annual projection of the fishing tackle that had been shipped at a given time (Vol. III, R.T. 144-163).

Jon H. solely fixed the per unit price of the fishing tackle in August of each year, and was based upon Customs duties, excise tax, freight and other charges. This price remained the same for the entire season (Pl. Ex. 22, Vol. II pp. 171-176).

The amount of Jon H.'s profit was not a fixed fee or percentage, but was over and above the importing charges and cost of the merchandise, which varied because some of the fixed costs of importation were the same regardless of whether there was a large or small shipment and other costs, such as warehousing, that were not passed on to Corex.

Corex did not participate in any manner in causing the shipment of the fishing tackle from Germany to Los Angeles, and had no interest of any kind prior to its arrival at the dock in Los Angeles, at which time

it exercised its right to accept or refuse the imported merchandise.

Jon H., and not Corex caused the imported fishing tackle to be released from Customs and Customs bonded warehouse (Vol. II, R.T. p. 113, 11. 9-22; Vol. III, R.T. p. 127, 11. 17-25). All of the brokerage fees and importation costs were not provided by Corex before receipt of the merchandise, as Jon H. paid with its own funds a total of $48,628.34 importation costs for this period (Pl Exs. D-1 and D-2). Vol. III 167-168.

The sale of the fishing tackle to Corex was intended to take place at the dock after release from Customs, and the transfer of title was at that time (Vol. III, R.T. p. 111, 1. 17 to 1. 8, p. 113; Vol. III, R.T. p. 125, 1. 24 to 1. 11, p. 126).

There was not any evidence that the procedures followed by Jon H. in bringing the fishing tackle into the United States were not in accordance with Corex's position that Jon H. was the importer.

Jon H. in order to increase sales gave Corex a promotional allowance of $354.00 to promote sales of spools and line (Vol. II, R.T. p. 122, 11. 2-9; Ex. 42). Vol. 2 Rt. Pl. Ex. 42, p. 85 Jon H.'s efforts to increase sales is evidenced by the fact that the sales tripled in 1969 over 1968 (Vol. II, R.T. p. 108, 11. 9-11. Pl. Ex. 20; Vol. II, 197; Vol. III, R.T. p. 129, 11. 5-11).

In addition, he made suggestions to increase sales with reference to merchandising fishing tackle in re-

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tail stores and, as a result, Corex did employ a man to assist the retail outlets in displaying and selling of packaged reels, hook and line (Vol. II, R.T. p. 124, l. 4 to l. 25, p. 125).

John Nessley made surveys of the financial market and advance customer trends in order to determine quantities of reels to purchase for a given year (Vol. III, R.T. p. 122, l. 17 to l. 17, p. 123).

Jon H. had other customers to whom it sold merchandise which was refused by Corex. They were Western Hoege, Johnson Drug Co., Boston Camping Distributing Company and Thrifty Drug Co. (Pl. Exs. 28-31, incl.). Vol. II 95-97.

The Court of Appeals mistakenly contrary to the fact held it was error for the trial court not to pursue any inquiry into the substance of the transaction, as required by *Import* and *Sony,* in that the District Court's findings were silent (1) on capitalization of Jon H., (2) how importation was actually financed, (3) who first dealt with the importer, (4) what ties existed between appellee and the exporter, and (5) whether Jon H. served a purpose other than procuring appellee's order.

The Court of Appeals may not make its own findings of fact, but nevertheless did so by premiseing its decision on the following:

1. Corex was owned by D.A.M.. the manufacturer, and was the importer initially.

2. Jon H. had no other clients. Nessley, operator of Jon H. was a full-time customs broker of Zerwekh.

3. Jon H. was established for the purpose of performing Corex's importing function.

4. Jon H. had minimal assets and was paid a small commission.

5. Unsecured credit was extended to Denker by Jon H. All brokerage fees were paid by funds provided by Corex.

6. Jon H. performed minimal promotional activities. (A. "B" p. 8)

The District Court of Appeals mistakenly, and contrary to fact, concluded as a matter of law that by applying *Import* and *Sony,* Jon H. was not the importer because it did not perform substantial promotional activities and bore none of the usual risks, performed no function other than a conduit, and earned little profit.

The District Court did consider these issues, and made its Findings of Fact and Conclusions of Law according to the evidence and applicable law (Vol. IV. R.T. p. 60).

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THE DISTRICT COURT WAS BOUND BY THE ISSUES OF FACT WHICH WERE SET FORTH IN THE PRE-TRIAL CONFERENCE ORDER, AND WAS NOT REQUIRED TO PURSUE ANY OTHER ISSUES:

Rule 16, of the Federal Rules of Civil Procedure provides:

> "The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any matters considered and *which limits the issues for trial to those not* disposed by admission or agreements of counsel; and such order when entered controls the subsequent course of action unless modified at the trial to prevent manifest injustice." (Emphasis added.)

Local Rule 9(g), paragraph VI, sets forth the form of the Pre-trial Conference Order.

The stipulated issues of fact, and no others, remaining to be litigated upon the trial were:

"ISSUES OF FACT AGREED UPON BY PLAINTIFF AND DEFENDANT:"

> "1. For each of the taxable quarters in suit, was the plaintiff, Corex, the importer of D.A.M. fishing lures and reels within the meaning of Section 4161(a) of Title 26, United States Code.
>
> 2. For each of the taxable quarters in suit, was the plaintiff Corex, the inducing and efficient cause of the importation of D.A.M. lures and reels into the United States.

3. For each of the quarters in suit, was the plaintiff, Corex, the first purchaser resident in the United States who arranged as principal and not as agent for D.A.M. fishing lures and reels to be imported into the United States.

4. For each of the quarters in suit, did the plaintiff, Corex, have title to the imported D.A.M. fishing lures and reels before they entered into the geographic United States and at the time they cleared Customs.

If not, when did the plaintiff, Corex, acquire title to the imported D.A.M. fishing lures and reels.

5. For each of the quarters in suit, did the Jon H. Importing Company acquire title to the imported D.A.M. fishing lures and reels.

If so, when did the Jon H. Importing Company acquire this title.

6. For each of the quarters in suit, did the plaintiff, Corex, assume any risk of loss for the imported D.A.M. lures and reels it acquired.

If so, when did the plaintiff, Corex, assume any risk of loss.

7. Did the plaintiff, Corex, make any advance payments to the Jon H. Importing Company prior to the time the imported D.A.M. fishing lures and reels were delivered to the plaintiff, Corex.

8. Did the plaintiff, Corex, withdraw from Customs or the Customs bonded warehouse the imported D.A.M. lures and reels it acquired."

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"ADDITIONAL ISSUES OF FACT PROPOSED BY THE PLAINTIFF, NOT AGREED TO BY THE DEFENDANT:

"1. Did the plaintiff, Corex, assume liability for the payment of the imported articles to Anton W. C. Denker and the expenses of importation, including the execution of General Term Bonds required to be posted by importers.

If the plaintiff did not, who did.

2. Did the plaintiff, Corex, pay Anton W. C. Denker for the imported articles it acquired; the sea and air freight; the marine insurance; the duty; the excise tax; the brokers fees; the warehousing; the wharfage; the transportation from the dock to the warehouse and the losses not covered by insurance.

3. Was the plaintiff, Corex, in the business of fabricating and distributing fishing poles for each of the quarters in suit."

"ADDITIONAL ISSUES PROPOSED BY THE DEFENDANT, NOT AGREED TO BY THE PLAINTIFF:

"For each of the quarters in suit, did the plaintiff, Corex, supply all funds necessary to accomplish the importation of the D.A.M. lures and reels into the United States (Clk. Tr. pp. 72-73)."

At the beginning of the trial, the District Court posed as some of the factual issues for determinination, the following:

1. Whether Jon H. was a bona fide importer.

2. Was the merchandise withdrawn from the bonded warehouse by Corex or Jon H.?

3. Was Jon H. acting as the mere agent or conduit of Corex, as a dummy, as a means of getting around a higher tax that would be charged on the sale price?

4. Was there a principal and agent relationship between the importer and the distributor?

5. Was there arms-length transaction between the importer and distributor, or just a cover-up to avoid taxes?

6. The paper-work, formation of the companies, and how they got started, financing contracts of importation.

7. Who pays freight, insurance, and costs.
(Vol. 1, R.T. pp. 5-14).

The Government did not, at the trial, challenge these issues.

Here we have an extensive record of the business transactions, the effect of dual interest of the owners of a partial interest in D.A.M. and Corex, motives, plans, and purposes of the parties which are revealed by the conversations, memoranda, documents, and accomplished acts.

At the conclusion of all of the evidence, the District Court again analysed all the evidence (Vol. III, R.T. pp. 216 to 241).

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The oral opinion of the Court shows a careful analysis of all of the evidence presented by the parties, and an evaluation of the controlling legal principles set out by the Revenue Rulings 67-209, 68-207, 69-393, and *Wholesalers* and *Sony*.

The District Court stated that while the documentary and legalistic evidence is not final, it must look at the realities; that in looking at the realities, it considered everything, all the evidence, testimony, legal documents between the parties, schedules drawn up by the Government, bank accounts, checks, arms-length dealings, and business considerations involving the importer and the exporter and the distributor; whether the importer was merely an agent, a conduit for a fixed fee; sales from Denker to Jon H., and sales from Jon H. to Corex; the investment, control by Corex of the operations, financial, economic business policies, or otherwise, over Jon H.; the selection of Jon H.; the withdrawal of the merchandise from the bonded warehouse; the law of sales between two persons or corporations, residents of the United States; the law of sales as to when title passed, and schedules of the Government.

The District Court compared these facts and others with those of *Sony*, and concluded they were not within those of either *Handley* or *Wholesaler Importer*, and found from a consideration of the undisputed evidence, as a whole, that Jon H. was the importer purchaser from Denker; seller to Corex; paid the Customs duties, all importation costs, excise taxes; obtained his

own line of credit; had own bank account; put in his own capital; made the payments to Denker from his own bank account; was liable to Denker for the purchase price; obligated for risk of any losses, term-bond, insurance, broker's fees, wharfage, and warehousing. John H. made up its own price list, and everything pointed, beyond a reasonable doubt and preponderance of the evidence, that Corex was not the importer. (Vol. IV. Rt. pp. 6-69).

Actually, the law is well settled that the Internal Revenue Service is free to disregard form when it contravenes substance—but only when it does contravene substance. Put another way, form, absent exceptional circumstances, reflects substance. The District Court found no exceptional circumstances, and it is this finding of fact that was the real issue before the Court of Appeals.

In the recent decision of *Edwards* v. *Commissioner,* 415 F.2d 578 (Cir. 10th 1969), it expressed quite forcefully the legal principles that special circumstances are required before courts will disregard arms-length business dealings of the parties.

> "It is, of course, true that the contractual form of a transaction cannot control the imposition of a tax liability when the realities of the transactions show that form does not represent a bona fide and actual agreement. But it is equally true * * * that the dignity of a contractual right cannot be set aside simply because a tax benefit results either by design or accident".

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In *Sony,* at page 1266, it distinguishes the facts in *Import,* stating, "Its functions did not compare in importance with those in the instant case."

It is also quoted at page 1261, from *Higgins* v. *Smith,* 308 U.S. 473, as follows:

> "While defendant is free to disregard form when it contravenes substance, it may not do so where substance does in fact exist."

Accordingly, form and substance in the case are, therefore, one and the same; and hence, the excise tax should be based on the sale between Jon H. and petitioner Corex, which was the first sale in the United States.

Petitioner's case was based on the genuine economic foundation in substance for the transactions as they were carried out. Jon H.'s place in the chain of title was proper, and its designation as the true importer was valid not only in form, but also in substance.

Jon H., in fact, arranged as principal, and not as agent, for petitioner Corex to import the taxable articles into the United States.

The Government did not come forward with any evidence that there was a tax benefit to petitioner by the substitution of Jon H. by Denker in its place as the importer.

The District Court found no such exceptional circumstances in the instant case, and that all the trans-

actions between petitioner Corex and Jon H. were at arms length.

The findings of the District Court were neither impossible nor inherently improbable. Indeed it was the only finding which it could make on the evidence before it.

No inference or presumption properly could be drawn from evidence that was not presented by the Government and outside the issues set forth in the pretrial conference order.

The Court of Appeals decision is in conflict and, in effect, departs from Rule 16 of the Federal Rules of Civil Procedure, which limit the District Court from going into any other issue than presented by the pretrial conference order.

THE COURT OF APPEALS MAY NOT SET ASIDE A JUDGMENT OF THE DISTRICT COURT UNLESS CLEARLY ERRONEOUS

Rule 52(a) of the Rules of Civil Procedure states:

> "Findings of Fact shall not be set aside unless clearly erroneous."

Various utterances of the Supreme Court and Courts of Appeal have emphasized the limited scope of appellate review under this rule.

Bellevue Gardens, Inc v. *Hill,* 297 F.2d 185, 186; (C.A. D.C. 1961)

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United States v. *Oregon State Med. Soc.* 1952, 343 U.S. 326, 72 S.Ct. 690;
United States v. *Yellow Cab Co.* 1949, 338 U.S. 338, 70 S.Ct. 177.

Under the clear and erroneous standard of review, the question is not simply whether the reviewing court would have found otherwise, but whether the reviewing court could permissibly find as it did.

Glapion v. *M. S. Journalist,* 487 F.2d 1252, 1255 (5 Cir. 1973)
Brown v. Ciggie & Millie, Inc., 485 F.2d 1293, 1295 (5 Cir. 1973)

At page 47, Vol. IV, R.T., the District Court in the instant case states:

> "and if anybody was inducing the importation, it was certainly Jon H. He was the one who wanted to build it up and Jon H. is the one that wanted to sell all that he could, and then get all he could from Denker, and then turn around and ask COREX how many did they want because they had the right of first refusal, and what he didn't want he would sell to anybody else."

It is also axiomatic that uncontradicted testimony must be followed.

Chesapeake and Ohio Railway Co v. *Martin,* 283 U.S. 209, 216, 217.

The Court of Appeals must view the evidence in the light most favorable to the party who prevailed

below; such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence. The findings of the trial court, sitting without a jury, must be accepted unless they are clearly erroneous; they cannot be upset if they are supported by substantial evidence.

Pacific Queen Fisheries v. *Symes,* 307 F.2d 700, 706 (9 Cir. 1962);

Stacher v. *United States,* 258 F.2d 112, 116 (9 Cir. 1958); Cert. den. 358 U.S. 907.

The findings of fact of the District Court are correct, and an Appellate Court does not revaluate the evidence nor substitute its judgment for the District Court's first hand evaluation.

Lindsay v. *McDonnell Douglas Aircraft Corp,* 485 F.2d 1288, 1289 (8 Cir. 1973);

J A Jones Const. Co. v. *Englert Eng. Co.,* 438 F.2d 3, 5 (6 Cir. 1971);

Crowe v. *Cherokee Wonderland, Inc.,* 379 F.2d 51, 53 (4 Cir. 1967).

The ultimate test as to the adequacy of findings is always whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. *Carr* v. *Yokahama Specie Bank Limited,* 200 F.2d 251, 255 (9 Cir. 1952).

Elaborate and detailed findings and conclusions are not necessary. *Trentman* v. *City and County of Denver,* 236 F.2d 951, 953 (10 Cir. 1956).

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Although the Court of Appeals might have concluded differently from the District Court, it is not its function to review the evidence *de novo*. *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 123; 89 S.Ct. 1562, 23 L.Ed. 2d. 129 (1969); *Panaview Door & Window Co* v. Reynolds Metal Co., 255 F.2d 926. (9 Cir. 1958).

The Court of Appeals did not hold that the findings of the District Court were "clearly erroneous," but on the contrary, in effect, held that it differed with the Court only as to the ultimate inferences to be drawn from the evidence in that the findings were silent as to the certain specific facts set forth on page 1020 of the opinion. (A. "B" 9)

In order to hold that a finding is clearly erroneous, the reviewing court on the entire evidence must be left with the definite and firm conviction that a mistake has been committed.

In applying this test, the powers of the Court of Appeals are not unlimited, and the mistake must be clear and convincing that a reasonable man could not have made the finding. If the mistake concerns conflicting evidence which permits of alternate inconsistent inferences, the Court of Appeals cannot substitute its inference for the one drawn by the District Court.

See *McAllister* v. *United States,* 348 U.S. 19, 20, 22, 23 (1954):

United States v. *United States Gypsum Co.,* 333 U.S. 364, 394 (1948).

In the instant case there was not any conflict in the evidence, and the findings of the court faithfully incorporated the sole evidence on the matter—it is not based on an inference, but exclusively on fact, and consequently there is neither the necessity nor propriety of the Appellate Court to resort to the inferences or presumptions which it did in this matter, and the Appellate Court had no power to do so.

Even if it were the function of the Court of Appeals to make new findings or draw an ultimate inference, it could base the same only on the evidence presented, and not that which the Government failed to present.

THE COURT OF APPEALS INCORRECTLY INTERPRETED SONY, IMPORT, AND REVENUE RULING 69-207:

The decision of the Court of Appeals is in conflict with *Sony,* 428 F.2d 1258, where the facts are materially similar to those in the instant case. However, in some respects, the facts in the instant case are much more favorable to appellee.

In *Sony,* 100 shares of 101 shares of Sony of America were owned by Sony of Tokyo, one share being owned by Irving Sagor. President of Agrod Electronics, Inc. Denker, the foreign exporter, had no interest in the manufacturer D.A.M., the importer Jon H., or in the distributor COREX.

In *Sony,* there was an exclusive distributor agreement with only one client, the terms of which were

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similar, except that COREX had first refusal and Jon H. did actually sell to others. *Sony* paid a fixed commission of 3% of the selling price, and was invoiced together with F.O.B. value of goods, customs duty, bond charges, and excise tax, all of which were included in the invoice. Jon H.'s compensation was a varied profit over and above cost of the merchandise and importation costs.

Jon H. incurred all the obligations provided in the general term given to Customs for entry of the merchandise in the amount of $100,000 (Pl. Ex. 3, Vol. II 32) and assumed all of the risks and liabilities connected with the importation of the merchandise (Vol. II, R.Tr. pp. 98 to 104, incl.).

Agrod's capital stock was $1,500; whereas Jon H.'s was $1,000, but it had established a line of credit with the Crocker Bank in the amount of $25,000 (P. Ex. 4, Vol. II 36). Agrod's staff consisted of two clerical employees and four individuals with knowledge of radio and electronics. Jon H.'s help consisted of his wife, a part-time bookkeeper, and himself. He had no need for more. Jon H. had warehouse facilities available in the Customs Bonded Warehouse. (Pl. Ex. 17, Vol. II, 71, Df. Ex. D2 Vol. III, 168)

In *Sony,* the subdistributor used a letter of credit to pay for the merchandise. Denker, the exporter, by extending credit, financed the payment of the merchandise and accomplished the same purpose as the letter of credit.

The lengthy credit extended by Denker was substantially reduced to within 10 days of arrival of goods in October 1969 (Pl. Ex. 33 Vol. II, 98). Agrod was part of the chain of title the same as Jon H. *Sony* does not hold that an importer must have the independent ability to pay for the merchandise nor finance the distributor.

On the contrary, it did not find any objections to the method of payment of the merchandise by the subdistributor, Sony of America, who opened a letter of credit with its bank in favor of Agrod at the time of placing an order. Agrod used the same bank, and would immediately assign the letter of credit in favor of Sony Tokyo. In effect, payment of the merchandise was guaranteed by Sony Corporation of America, and its bank issued the letter of credit prior to shipment from Japan.

In *Sony,* at page 1267, the Court found that all the contracts involved demonstrate arms-length bargaining:

> "There can be no question that the contracts between Mr. Gross and Sony Tokyo were at arms length and based on sound business considerations as were those between Mr. Gross, Agrod, and Delmonico.
>
> "The fact that these contracts were basically continued throughout with different parties is very persuasive, as is the fact that the government apparently accepted Agrod as the importer when Delmonico was the designated subdistributor."

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The appellant never challenged the relationship between COREX when it was the importer, and Gladding the distributor, and the only difference in the facts here is that Jon H. was substituted in the place of COREX as the importer.

The District Court made substantially the same finding of fact as in *Sony* (Clk. Tr. No. 9, p. 161). The authority of *Sony* has not been challenged by any later decisions.

In *Import Wholesale Corp.* v. *U.S.*, 368 F.2d 577 (Ct. Cl. 1966), the substance of the transaction was to supply it with a method of importing VWs into the United States. Deeren supplied none of the funds for importation. Its only act was to place the order for plaintiff for a stipulated fee of $5.00 per auto, which was made directly to Deeren, and *Import* would pay directly all costs and expenses incurred by Deeren in importing VWs. The only insurance was a bearer policy. Deeren had not issued stock, no assets or credit, and no paid-in capital.

Deeren assumed no risk and bore no responsibility, and the Court disregarded the alleged importer because it served basically as merely a name of record, and there was absolutely no business purpose for its existence.

It did not use any of its own funds, or assume any of the risks that Jon H. did. Actually the primary motive for Deeren's existence was to save excise taxes.

There is not any evidence that the appointment of Jon H. as the importer was motivated for the purpose of avoiding taxes, for the reason that there was no showing that any taxes were saved when he became the importer in the place of COREX. When COREX acted as the importer, obviously it was compensated for the services which it performed in importing the goods, which were sold to the distributor Gladding. The small profit realized by Jon H. did not result in any tax benefit to COREX when it became the distributor, which is further demonstrated that competitors reels were selling at lower prices than were "QUICK" reels (Pl. Ex. 25, Vol. II p. 28).

In the Revenue Ruling 69-207, "(Z)" did not assume any of the risks of a typical importer. Its compensation was 2%, which was added to the landed cost of the merchandise. The only purpose for which Jon H. was established, was to take over the functions of a pre-existing importer. In the Revenue Ruling, the motive for creating "(Z)" was tax avoidance.

Jon H.'s operations met all the tests set forth in Revenue Ruling 69-207, 1967-1 Cum. Bull. 179. It exposed itself to, and assumed all the risks involved in importing merchandise. Jon H. was a separate unrelated entity, and it was only obligated to offer the imported merchandise for acceptance or rejection.

The merchandise was sold Ex. Dock. Pl. Ex. 12 Vol. II 41 shows check register of Jon H. payment of duties to bank, Crescent Warehouse, telephone, and

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other incidental expenses. (Pl. Ex. 18, Vol. II 86) shows losses paid by Jon H. to COREX. Because of the differences in fact, Revenue Ruling 69-207 is not applicable to Jon H.'s situation.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with the applicable decisions of this Court, and conflicts with the decisions of the United States Courts of Appeal, and with its own controlling decisions, and with decisions of other Circuits, among them being but not limited to:

McAllister v. *United States,* 349 U.S. 19, 20 (1954);

Zenith Corp. v. *Hazeltine* 395 U.S. 100, 123 (1969);

United States v. *United States Gypson Co.,* 333 U.S. 364, 395 (1948);

Guzman v. *Pichirilo,* 369 U.S. 698, 702 (1962)

Carr v. *Yokohama Specie Bank, Ltd.,* 200 F.2d 251 (9 Cir. 1952);

Brown v. *Ciggie & Millie, Inc.,* 485 F.2d 1293. 1295 (5 Cir. 1973);

Lindsay v. *McDonnell-Douglas Corp.,* 485 F.2d 1288 (8 Cir. 1973);

Glapion v. M. S. Journalist, 487 F.2d 1252, 1254 (5 Cir. 1973);

Bianchini v. *Humble Pipe Line Co.,* 480 F.2d 251 253 (5 Cir. 1973);

Bellevue Gardens, Inc. v. *Hill,* 297 F.2d 185, 186 (C.A. D.C. 1961);

Panaview Door & Window Co. v. *Reynolds Metals Co.,* 255 F.2d 820 (9 Cir. 1958).

The decision of the Court of Appeals in this case, if permitted to stand, departs from the usual course of judicial proceedings under Rule 16 of the Federal Rules of Civil Procedure, and will substantially alter the procedures in actions tried in the District Court, in which uniformity of statutory interpretation is of utmost importance as a guide for the expeditious judicial administration by all District Courts.

The question is of great public importance and, in principle, affects civil cases in which reviewing courts may set aside a finding of fact of the trial court and substitute contrary findings solely because the issues of fact were not set forth in the pre-trial conference order, in contravention of Rule 16, and the scope of review is materially changed from that prescribed by Rule 52(a) and by the decisions of this Court.

The question involved as to who is the importer under 28 U.S.C. 4161, Internal Revenue Code of 1954, is of utmost importance as it affects a great number of importers and is in conflict with the holding in *Sony*, 428 F.2d 1258, and it will disrupt imports into the United States as it is common practice for all distributors, jobbers, and chain-store operators to use importers to bring in merchandise for them to the United

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States and secure payment by letters of credit or sight drafts therefore leaving no clear guidance in law for importers to follow in the operation of their businesses.

Respectfully submitted,

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Attorney for Petitioner

Appendix

APPENDIX "A"

COREX CORP. d.b.a. Quick Corporation of America, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 72-1272-AAH.

United States District Court,

C. D. California.

June 28, 1973.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAUK, District Judge.

FINDINGS OF FACT

1. The plaintiff at all times relevant was a resident of Orange County, State of California, and the Central District of California, and was conducting a wholesale jobbing and distribution business in the United States of fishing equipment under the name and style of Quick Corporation of America.

2. That defendant, United States of America, is a sovereign body politic.

3. That this is an action for refund of manufacturer's excise taxes imposed under Section 4161(a) of Title 26, United States Code, arising under Title 28 U.S.C. Section 1340 and 1346(a)(1).

4. That on or about March 20, 1972, defendant assessed against plaintiff a deficiency in excise tax in the sum of $1,232.41 for the period ended September 30, 1968, and interest in the sum of $250.13.

5. That on or about April 25, 1972, plaintiff paid the defendant the assessment in the sum of $1,232.41, and interest to May 1, 1972, in the amount of $258.81, making a total of $1,491.22.

6. That on or about May 5, 1972, plaintiff duly filed a claim for refund of said $1,491.22, which claim was disallowed on or about May 24, 1972, by notice dated May 24, 1972.

7. That Jon H. Importing Company was a sole proprietorship owned by Ruth Marie Nessley, of Cypress, California, and acted independently of plaintiff, who did not invest in, direct, or control the operations in any shape or form, financial, economic, business policy, or otherwise, of Jon H. Importing Company.

8. That on or about October 7, 1968, plaintiff and Jon H. Importing Company, two resident citizens of the United States, entered into a written contract which recited that Jon H. Importing Company had been appointed the exclusive importers of D.A.M. fishing products. and appointed Quick Corporation of America (plaintiff) as sole distributor in the United

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States, Hawaii, Alaska, Virgin Islands, and Puerto Rico. The contract provided, among other things, that plaintiff shall have the first option to purchase all of said D.A.M. fishing products imported by Jon H. Importing Company, at prices on the basis of CIF, duty, and excise taxes, paid Los Angeles harbor or Customs bonded warehouse based on shipment by ocean vessel. In the event of air shipments, air freight costs will be added to the invoices, along with delivery charges from airport to Costa Mesa.

9. That all dealings between plaintiff and Jon H. Importing Company were sales by Jon H. Importing Company, as the importer, to plaintiff, who purchased as a distributor. All of said sales to plaintiff by Jon H. Importing Company were arms length transactions.

10. That all of the business dealings between plaintiff and Jon H. Importing Company were that of principal and principal, and not principal and agent.

11. That Jon H. Importing Company did not act as agent for plaintiff, but was the principal for itself, only, in importing the taxable articles into the United States.

12. That the taxable articles upon which the manufacturer's excise tax was assessed therein, arrived at the port of Los Angeles at various times between August 1, 1968, and December 30, 1969, and were unloaded at the port of Los Angeles in accordance with the sea- and air-bills of lading.

13. That all of the special Customs invoices were prepared and issued by Anton W. C. Denker, the exporter and seller of the taxable articles to Jon H. Importing Company, and showed that Jon H. Importing Company was the purchaser thereof.

14. That all bills of lading issued by the sea- and air-carriers were made to the order of the shipper, to-wit: Anton W. C. Denker, and showed party to be notified as Jon H. Importing Company.

15. That all carriers' certificates and release orders certified to whom, or upon whose order, the articles described therein must be released, as being Jon H. Importing Company, of Cypress, California, the owner or consignee of such articles within the purview of Section 484(h), Tariff Act of 1930. The Release orders directed to the Collector of Customs provided that, in accordance with the provisions of Section 484 (j), Tariff Act of 1930, authority is hereby given to release the articles covered by the carrier's certificate to Jon H. Importing Company.

16. That all of the consumption and warehouse entries for the taxable articles showed Jon H. Importing Company as the importer of record.

17. That plaintiff was not named in any of the documents of improtation of the taxable articles, nor was it involved in any manner in the importation thereof.

18. That all applications to the Bureau of Customs

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for immediate delivery permits were made for Jon H. Importing Company by Edward S. Zerwekh Company, its attorney-in-fact.

19. That all the original non-negotiable warehouse recipts were in the name of Jon H. Importing Company, who was the owner of the taxable articles which were delivered on the order of Jon H. Importing Company to plaintiff after having been withdrawn from the bonded warehouse by Jon H. Importing Company.

20. That the taxable articles were cleared through Customs and were withdrawn from Customs or Customs' bonded warehouses by Edward S. Zerwekh Company, Customs brokers, who acted solely as agent of Jon H. Importing Company, the importer, the party who sold the taxable articles to plaintiff at a profit either ex dock or ex warehouse if the taxable articles went through a Customs bonded warehouse.

21. That plaintiff did not withdraw any taxable articles from a Customs bonded warehouse, nor was it entitled to do so.

22. That plaintiff did not intend to, and did not, take possession and title to the taxable articles until after they had been cleared through Customs, and either released from Customs' custody or from a Customs bonded warehouse.

23. That Jon H. Importing Company's payments of the premiums on the term bond, insurance, excise taxes, Customs duties, brokerage fees, warehousing, CF

price, wharfing, payment of goods, and all other expenses of importation on the taxable articles were all bona fide.

24. Except as specifically found herein, none of the allegations of defendant's answer and counterclaim is true.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the parties and of the subject-matter of this action.

[1] 2. The term [importer], as used in Section 4161(a) of Title 26, United States Code, is the person who arranges [as principal, and not as agent] for the goods to be brought into the United States.

[2] The plaintiff did not, as a principal, arrange for, induce, or cause, the taxable articles to be brought into a port of the United States with intent to unload. Neither did it actually import the taxable articles.

4. That neither plaintiff, nor his agent, withdrew the taxable articles from a Customs bonded warehouse.

5. The plaintiff never had any interest or title in the taxable articles until after they had been cleared and released from Customs custody or withdrawn from a Customs bonded warehouse, and title to the taxable articles did not pass to plaintiff until after it received delivery and possession thereof, which was after release from Customs custody or withdrawal from a Customs bonded warehouse. Rev.Rul. 56-409, 1956 Cum.

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Bull. 796, and West's Ann.U.C.C. §2401 (2) (3) (a).

6. That the first sale of the taxable articles in geographic United States was made by Jon H. Importing Company, upon which it made a profit and paid the excise taxes due thereon.

7. That plaintiff was not the importer of the taxable articles within the meaning of 26 U.S.C. §4161.

8. It follows that the manufacturer's excise taxes in question were illegally and erroneously assessed against, imposed upon, and paid by plaintiff.

9. Plaintiff is entitled to recover from defendant the sum of $1,491.22, with interest thereon at the rate of six percent (6%) per annum from April 25, 1972, until paid, in accordance with the terms and provisions of Section 6611 of the United States Code Title 26, together with costs.

10. The Counterclaim is hereby dismissed on its merits on the ground that defendant is not entitled to a judgment thereon.

The foregoing Findings of Facts and Conclusions of Law are hereby approved as to form.

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APPENDIX "B"

COREX CORP. d.b.a. Quick Corporation
Plaintiff-Appellee,
v.
UNITED STATES of America,
Defendant-Appellant.

No. 73-3332.

United States Court of Appeals,
Ninth Circuit.

Oct. 7, 1975.

Before: CARTER, HUFSTEDLER and GOODWIN, Circuit Judges. JAMES M. CARTER, Circuit Judge.

This appeal involves a refund suit brought by the Corex Corporation ("Corex") for money paid pursuant to an excise tax assessment under Section 4161 of the Internal Revenue Code of 1954, 26 U.S.C. §4161. The United States brought a counterclaim for other unpaid excise taxes. Section 4161 imposes upon the sale of fishing gear by the manufacturer, producer, or importer a tax equivalent to ten percent of the price for which it is sold by the taxpayer.

Following a nonjury trial, findings of fact and conclusions of law were entered in favor of the taxpayer.

The issue on appeal is whether the appellee coux or anather firm, Jon H. Importing Company ("Jon H."). was the "importer" subject to the tax. We reverse.

"Quick" brand fishing reels and supplies were manufactured in West Germany by Deutsche Angelgerate Manufaktur ("D.A.M.") and exported to the United States and Canada by Anton W. C. Denker ("Denker"), an export firm located in West Germany. During the years in issue D.A.M. was owned by Rupert and Lotz Kuntz with their mother, Annelisa Kuntz. In July, 1965, Rupert and Lotz, together with Philip Greyshock (a former representative for D.A.M.) incorporated Corex in Califonia, for the purpose of importing fishing equipment and sporting goods. Corex began operations as the exclusive importer of D.A.M. fishing reels and supplies.

Between 1965 and the summer of 1968 Corex continued as the importer. The Gladding Corporation ("Gladding"), a separate and unrelated entity, was the distributor. In June, 1968, Denker (exporter) and Corex (importer) decided to terminate the distribution activities of Gladding. Corex assumed the distribution activities and a new entity, Jon H., was established to take over Corex's importing function. The role of Corex in the formation of Jon H. remains unclear.

Jon H. was an incorporated association owned by Ruth Nessley and operated by her husband John. John Nessley was also an active officer in the Edward Zer-

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wekh Company ("Zerwekh") a customs brokerage firm. Jon H. had $1000 in capital assets. Following formation, Denker named Jon H. the "exclusive importer" of D.A.M. products and Jon H. designated Corex as the "sole distributor". Authough Jon H. could designate another distributor if Corex failed to exercise its option, during the years relevant to this suit Corex received all supplies "imported" by Jon H.

Transactions between Denker, Jon H. and Corex would begin when Denker prepared and sent its invoice, a special customs invoice, and a packing list of the shipment, to Jon H. Copies were sent to Zerwekh. Jon H. would notify Corex, which in turn sent to Jon H. its (Corex's) purchase order for the entire shipment. Jon H. then prepared and sent its purchase order to Denker.

Zerwekh, the brokerage firm, handled most of the details related to the physical importation of D.A.M. products. Zerwekh arranged for the customs entry (declared the value and duty rates, and submitted documents to Customs officials), caused the merchandise to be released from Customs, arranged for the delivery to Corex, and paid all expenses (including import duties, freight and docking charges, and insurance) and billed Jon H.

To finance the importation Denker extended credit, which was unsecured, to Jon H. for the entire amount of the purchase. Jon H. extended an equal amount of credit to Corex, but Jon H. did require an advance

payment of a portion of its invoice. The advance payment roughly equalled the expenses Jon H. incurred through Zerwekh. Jon H. paid its importation expenses upon receiving Corex's advance payment.

Other than the advance payments used to pay importation expenses, Jon H. did not receive any payments from Corex during the first eight months of the relationship. During the same period Jon H. made no payments to Denker. In April, 1969, Corex finally began making substantial payments to Jon H.; immediately Jon H. would forward the same amount to Denker.

Jon H. received a profit averaging only 1% of sales, about $13,000 for 1968 and 1969. The small profit resulted, according to the plaintiff, from the need to keep its selling price low so that Quick products could be priced competitively. The services for which Jon H. received the profit, in addition to forwarding payment to Zerwekh and Denker, were activities of "promotion": one allowance of $354 was granted to Corex in an attempt to promote the sales of spools with line, Nessley once recommended to Corex that it make a greater effort with respect to its retail outlets, and Nessley sugggested to Corex that small reels, rods, and lines be offered together as an inexpensive package.

The trial judge held that the dealings were sales by Jon H., as the importer, to Corex, who purchased as a distributor. The sales were found to be arms-length transactions and Jon H. was held to be acting as

a principal and not as agent for Corex.

The appellant contends that the trial court erred by placing undue emphasis upon the formalities of the transactions: that Denker's customs invoice, carriers' certificates, and bills of lading showed Jon H. as the purchaser or the party to be notified; that the customs release orders named Jon H. as the importer of record; and that Corex was not named in any of the documents and did not take title until the merchandise was delivered to Corex's possession. The Judge's findings were silent on (1) the capitalization of Jon H., (2) how importation was actually financed, (3) who first dealt with the exporter, (4) what ties existed between appellee and the manufacturer, and (5) whether Jon H. served a purpose other than procuring appelee's orders.

In this appeal this court is not bound by a misapplication of law to the evidentiary findings by the court below. *United States v. Armature Rewinding Co.*, 124 F.2d 589 (8 Cir. 1942). To determine if a misapplication has occurred we must identify the relevant test and ascertain if the trial court properly applied the test.

The determination of who is the importer subject to tax has been undertaken only rarely. The major cases are *Import Wholesalers Corp.* v. *United States*, 368 F.2d 577 (Ct. Cl. 1966) and *Sony Corp. of America* v. *United States*, 428 F.2d 1258 (Ct. Cl. 1970). According to *Import*,

> "... the determination of who is the 'importer'

under the pertinent statute does not turn on technical rules such as the law of sale, but rather on the realities as to who arranges as principal and not as agent for the articles to be imported into the United States." 368 F.2d at 583.

In *Import* the court held that the paintiff, a Volkswagen dealer, was the actual "importer", rather than the Deeren Trading Corporation ("Deeren") as contended by the plaintiff, although Deeren had entered the chain of tite and was named in the import documents. The evidence in *Import* showed that one Kirkiles, with two others, decided to enter the car business in Miami, Florida. They formed the plaintiff corporation and established credit with a local bank. Kirkiles approached a friend, Petrides, and suggested that the latter take over and incorporate the Deerden Trading Co. in New York. Deeren had no assets.

Subsequently Deeren, as seller, and plaintiff, as purchaser, entered into a written agreement whereby plaintiff agreed to purchase from Deeren between 100 and 300 cars per month for a competitive market price (which included the invoice cost and all importation expenses) plus $5 for each automobile. All expenses were to be paid by plaintiff and the $5 per car was to be paid directly to Deeren.

The court held that the "overall substance of the importation" was that the formalities were, as a matter of fact, subordinate to the supply by plaintiff of all funds necessary to accomplish the importation. Deer-

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en had no credit and supplied none of the funds, and was paid an insufficient sum for assuming any risk. Deeren's only act was to place plaintiff's orders with the seller. The court concluded that the plaintiff was the "inducing and efficient cause" of the importation, and therefore was the importer. 368 F.2d at 585.

On similar, but not identical, facts in *Sony,* a different result was reached. The evidence showed that Sony of Tokyo ("Sony T"), desiring to stimulate sales in the United States, entered into a sales agency agreement with one Gross, a noted entrepeneur. Sony T also designated the Agrod Corp. ("Agrod"), owned by Gross, as exclusive distributor. Agrod initially subdistributed to Delmonic International Corporation; Delmonic was later replaced by Sony of America ("Sony A"). Sony T controlled Sony A.

The usual practice was that Sony A placed an order with Agrod, and Agrod then ordered from Sony T. Sony A opened an assignable letter of credit in Agrod's favor, which Agrod immediately assigned to Sony T. Agrod arranged to deliver or store the merchandise and Agrod made all other payments (freight, customs, insurance, and bonds).

The court held that Agrod was the importer. Agrod functioned as an importer: it had extensive knowledge of the United States market, advised Sony T as to which vessels to use for shipment, selected a national advertising agency, and continuously promoted Sony products. Agrod's employees, "highly knowledge-

able" in the business, were active in relationships with distributors of other products. Finally, the fact that Agrod was the importer before the existence of Sony A illustrated that the dealings between Sony A, Agrod, and Sony T were bona fide.

In comparison to *Import* and *Sony* the district court in this case did not pursue an in depth examination of the substance of the relations between the parties. The court did not mention the following facts, most of which were undisputed:

1. Corex was owned by D.A.M., the manufacturer, and was the importer initially.

2. Jon H. had no other clients. Nessley, operator of Jon H., was a full time customs broker for Zerwekh.

3. Jon H. was established for the purpose of performing Corex's importing function.

4. Jon H. had minimal assets and was paid a small commission.

5. Unsecured credit was extended by Denker to Jon H. All brokerage fees were paid by funds provided by Corex.

6. Jon H. performed minimal promotional activities.

The trial court did not pursue an inquiry into the substance of the transactions, as required by *Import* and *Sony*. A careful weighing of all the factors was necessary; a mere recitation of the contract formalities

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was insufficient. Applying *Import* and *Sony,* Jon H. was not the importer: Jon H. did not perform substantial promotional activities, Jon H. bore none of the usual risks, performed no function other than as a conduit, and earned little profit.[1]

REVERSED.

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[1] *See* Revenue Ruling 67-209, 1967-1 Cum. Bull. 179. This ruling gives a hypothetical case which is similar to this action: X, a foreign corporation, and Y, a subidiary marketing X's products in the United States, arranged with Z for importation. Z is an unrelated corporation. Z is required to deliver all of X's products to Y.

Y submits an order to Z, who forwards the order to X. All documents show Z to be the importer. Y pays Z's brokerage expenses, X's invoice price, plus a 2% "profit" for Z. Z is not an importer because he doesn't assume any of the risks of a typical merchant importer.

In the Supreme Court of the United States

OCTOBER Term, 1975

No. 75-1088

COREX CORPORATION, D/B/A QUICK CORPORATION OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 4161 of the Internal Revenue Code of 1954 imposes a 10-percent excise tax on the price charged by the manufacturer, producer, or importer on the sale of fishing equipment. The question presented by the petition is whether petitioner or Jon H. Importing Company was the importer of "Quick" brand fishing reels and supplies. If, as the court of appeals held, petitioner was the importer, the excise tax was properly imposed upon the price which petitioner charged to its customers and not upon the lower price that Jon H. charged petitioner.

The pertinent facts are essentially undisputed. Petitioner was incorporated in 1965 by Rupert and Lotz Kuntz, who owned 75 percent of its stock and who, together

with their mother, owned Deutsche Angelgerate Manufaktur (D.A.M.), a German firm which manufactured "Quick" brand fishing equipment[1] (Pet. 4; Pet. App. B 2). Between 1965 and 1968, petitioner concededly was the importer of "Quick" equipment and the Gladding Corporation, a separate, unrelated entity, was the distributor. In June, 1968, petitioner took over the distribution activities of Gladding and substituted a new entity, Jon H. Importing Company ("Jon H."), as the sole importer of record (Pet. 4-5; Pet. App. B 2-3).

Jon H. in turn designated petitioner as "sole distributor" of "Quick" products. However, Jon H. never put up any of its own funds in connection with the importation but received advances from petitioner and credit from the German exporter. Jon H. was a proprietorship owned by Ruth Nessley. It was operated by her husband, John Nessley, who was also an officer and customs broker at the Edward Zerwekh Company, the customs brokerage firm which handled the details relating to the physical importation of D.A.M. products (Pet. 5; Pet. App. B 2-4).[2]

On these facts, the Commissioner of Internal Revenue determined that petitioner and not Jon H. was the importer of the products because petitioner advanced all of the necessary funds and was the "inducing and efficient cause of the importation." *Import Wholesalers Corp.* v. *United States*, 368 F.2d 577, 585 (Ct. Cl.). As a result, the

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[1]"Quick" equipment was exported to this country by Anton W.C. Denker, an export firm in Hamburg, Germany (Pet. 4; Pet. App. B 2).

[2]Jon H. was formed with initial capital of $500, which was later increased to $1,000 (Pet. App. B 3). It had no separate place of business (it operated out of the Nessleys' home) and had no employees or warehouse facilities (Transcript of Proceeding, May 16, 1973, p. 120).

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Commissioner imposed the excise tax on the price at which petitioner sold the goods to its customers and not on the lower price petitioner paid Jon H. In this refund suit, the district court held that Jon H. was the importer for excise tax purposes (Pet. App. A 1-7). The court of appeals reversed (Pet. App. B 1-9).

1. Petitioner contends that the court of appeals improperly substituted its factual conclusions for those of the trial court. But as the court of appeals stated (Pet. App. B 5), its reversal was based on the trial court's erroneous reliance upon the labels of "importer" and "distributor" which petitioner and Jon H. employed in their written agreements. The court of appeals correctly held that for excise tax purposes those paper designations must yield to the economic realities of the relationship between petitioner and Jon H.

The decision of the court of appeals is in accord with the applicable precedents which recognize that identification of the "importer" for excise tax purposes does not depend on the formalities of the law of sales. See *Handley Motor Co.* v. *United States*, 338 F.2d 361 (Ct. Cl.); *Import Wholesalers Corp.* v. *United States, supra;* and *Sony Corp. of America* v. *United States*, 428 F.2d 1258 (Ct. Cl.). Thus, the fact that title to the imported goods may temporarily reside in one party which acts as a conduit on behalf of another party is of no consequence. See *Handley Motor Co.* v. *United States, supra*, 338 F. 2d at 364, and *Import Wholesalers Corp.* v. *United States, supra*, 368 F.2d at 583. The economic realities determine who is the importer on the basis of who is the "inducing and efficient cause of the importation." *Import Wholesalers Corp.* v. *United States, supra*, 368 F.2d at 585.

Here, there can be no doubt that the economic realities were that petitioner, and not Jon H., was the "inducing and efficient cause of the importation." Petitioner was the

source of the initial commitment to purchase each shipment of "Quick" equipment as it became available for export and purchased all of such equipment "imported" by Jon H. (Pet. App. B 3). As each shipment arrived in this country, petitioner advanced the necessary funds to Jon H. to meet its expenses (Pet. App. B 4, 8). Indeed, Jon H. placed orders with the exporter only when it had received an order in the same quantity from petitioner (Govt. Ex. U). Jon H. received unsecured credit from the exporter, and paid the exporter for goods only after petitioner paid Jon H. Finally, Jon H. had minimal assets and received a small one percent commission for its services (Pet. App. B 3-4, 8).

On these facts, the court of appeals correctly concluded that Jon H. performed no meaningful function which would justify its classification as an importer. Thus, for purposes of the excise tax, petitioner was the importer of the goods.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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[3]Contrary to petitioner's contention (Pet. 24), the decision of the court of appeals does not conflict with *Sony Corp. of America* v. *United States*, *supra*. Unlike the situation here, the named importer in *Sony* functioned as an independent business and had previous bona fide dealings as the importer with the foreign manufacturer before the foreign manufacturer formed a domestic subsidary corporation for the distribution of its products in this country. Moreover, the named importer performed substantial services and actively maintained relationships with Sony distributors.

Petitioner's reliance (Pet. 28) upon Rev. Rul. 67-209, 1967-1 Cum. Bull. 297, is similarly misplaced. That ruling rests on the same economic analysis employed by the court of appeals in this case to determine who was the importer.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1088

COREX CORPORATION, dba QUICK CORPORATION OF AMERICA
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION FOR PETITION FOR CERTIORARI

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WESTERN PRINTING COMPANY, WHITTIER—696-1722

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The Memorandum for the United States in Opposition for the Petition for Certiorari is based upon the Commissioner of Internal Revenue's determination, and not that of the District Court, which considered the real issues set out in the case law and Revenue Bulletins, among them being: (1) whether a principal and agency relationship existed, (2) when does the title pass as between two residents in the United States, (3) who withdraws the merchandise from the bonded warehouse, (4) what did the paper-work show

(Vol. I, R.T. p. 16, 11. 7-15, 25, 1. 15 p. 17), (5) whether Jon H. was a *bona fide* importer, (6) was there arms-length transaction between the importer and distributor or just a cover-up to avoid taxes, (7) the paper work, formation of the companies, and how they got started, financing contracts of importation, (8) who pays freight, insurance, and costs (Vol. I, R. T. pp. 5-14). and found in favor of petitioner.

Respondent, in setting forth the facts, omits the most salient facts which were considered by the District Court in arriving at its Findings.

Petitioner was originally organized for the primary purpose of importing and exporting fishing equipment (Df's Ex. AA, Vol. III, R.T. p. 211).

Petitioner was not owned by D.A.M., but by Phil Greyshock, a 25% stockholder, and by Lutz Kuntze and Rupert Kuntze who, between them, owned the balance of the 75% issued stock, and who had a part-interest in D.A.M., which was not a corporation. Shortly after its formation, Petitioner began operations as the exclusive importer of D.A.M. fishing reels and supplies (Vol. IV, R.T. pp. 42, 136).

Petitioner continued to be the importer until the summer of 1968. During this period, the distributor was the Gladding Company, a separate unrelated entity.

In June 1968, Gladding decided to get out of the business of distributor of "Quick" reels because they

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were going into the manufacture of a very similar product they were making themselves (Vol. III, R.T. p. 137).

Denker, the German exporter who had exclusive rights to the United States market, had no financial interest in D.A.M. or petitioner, made the decision to substitute petitioner in the place of Gladding, as the distributor, and Jon H. in the place of petitioner, as the importer (Vol. III R.T. pp. 140-141).

The respondent does admit, on page 2 of its memorandum, that when in June 1968, petitioner took over the distribution activities of Gladding, that there was substituted in its place a new entity, Jon H. Importing Company.

The cases of *Handley Motor Co.* v. *United States,* 338 F.2d 361 (Ct. Cl.); and *Import Wholesalers Corp.* v. *United States,* 368 F.2d 577, 585 (Ct. Cl.), cited by the respondent, are not in point, and are distinguishable for the reason that the substance of the transactions was to supply the importer with a method of importing V.W.'s into the United States, and its only act was to place its order for a stipulated fee without assuming any of the risks of importation.

Jon H. took the initiative to bring the fishing tackle into the United States, by ordering all the fishing tackle that was available, without first consulting petitioner. This was done on the basis of annual projec-

tion from Denker of the fishing tackle available. (Vol. III R.T. p. 147 line 10 to line 15, p. 148) Purchase orders were not issued by petitioner until Jon H. received notification from Denker of the portion of the annual projection of reels that had been shipped at a given time (Vol. III R.T. p. 145, lines 7-11).

The respondent entirely overlooks the undisputed fact that Jon H. initiated the credit arrangement with Denker (Vol. III, R.T. p. 40). Jon H. established a line of credit with the Crocker Bank in the amount of $25,000 by putting up a Certificate of Deposit in the amount of $10,000 (Pl. Ex. 41, Vol. II, R.T. p. 95, l. 1 to l. 2 p. 96). Jon H., without consulting petitioner, fixed the per-unit price at the beginning of each year, which remained the same for the entire season (Pl. Ex. 22, Vol. II p. 71, R.T. pp. 171-176).

The amount of Jon H.'s profit was not fixed, but was over and above the cost of the merchandise and all costs of importation, which varied due to the fact that some of the costs of importation were the same regardless of whether there was a large or small shipment (Pl. Ex. 17 and 34, Vol. II, R.T. pp. 17 and 105). Warehousing and other costs were not passed on to the petitioner in the price charged.

Jon H. subjected and exposed itself to the following risks, among them being: (1) Liability for $100,000 on a term-bond executed in favor of the United States (Pl. Ex. 3, R.T. Vol. II, p. 32). (2) payment to Denker for the merchandise. (3) payment of insurance,

(4) losses not covered by insurance, (5) brokerage fees, (6) payment of excise tax and duties, (7) warehousing, (8) wharfage and handling charges, (9) all other costs and expenses of importation including local property taxes (Vol. II, R.T. p. 98, l. 8 to l. 4 p. 103; Pl. Ex. 18 R.T. Vol. II, p. 194).

Jon H. caused merchandise to be released from Customs or a Customs bonded warehouse. All the brokerage fees and importation costs were not provided by petitioner before receipt of merchandise, as Jon H. paid a total of $48,638.24 importation costs (Df. Exs. D-1 R.T. Vol. III, p. 168, and D-2 p. 168).

The facts in the *Sony* case, 428 F.2d 1258, upon which the petitioner relies, are essentially similar to those in the instant case. However, in some respects, the facts in the instant case are much more favorable to the petitioner. In *Sony,* 100 or 101 shares of *Sony of America* were owned by *Sony of Tokyo.* In *Sony,* there was an exclusive distributor agreement with only one client, whereas the petitioner had the first refusal to purchase the merchandise, and Jon H. did actually sell to other distributors (Vol. III, R.T. p. 154, l. 19 to l. 14 p. 159; Pl. Exs. 27 to 31, Vol. II, R.T. pp. 89, 90, 95, and 97.

Respondent premises some of its argument on the low overhead and profit made by Jon H. as a factor which the District Court did consider in determining who is the importer. *Sony* did not consider the fixed commission of 3% of the selling price that was

invoiced F.O.B., value of goods, Custom duty, bonded charges, and all excise tax, which were included in the invoice as determinative of one of the real issues.

Jon H. was forced to a minimum of overhead in order to meet competition, and had its overhead been greater, it could not have made any profit at all.

The decisions or the regulations do not dictate the amount of profit that one is entitled to in order to come within the definition of an importer.

Agrod's capital stock was $1,500, whereas Jon H.'s was $1,000. Jon H. had warehouse facilities available in a Customs bonded warehouse (Pl. Ex. 17, Vol. II, p. 71, and Df. Ex. D-2. Vol. III, R.T. p. 168.

In *Sony,* the subdistributor used a letter of credit to pay for the merchandise. Denker, the exporter, and not the petitioner financed the payment of the merchandise by extending the credit, which accomplished the same purpose as a letter of credit. *Sony* does not hold that an importer must have the independent ability to pay for the merchandise.

In *Sony,* at page 1267, the Court found that all the contracts involved demonstrate arms-length bargaining:

> "There can be no question that the contracts between Mr. Gross and Sony Tokyo were at arms length and based on sound business considerations as were those between Mr. Goss, Agrod, and Delmonico.

> "The fact that these contracts were basically continued throughout with different parties is very persuasive, as is the fact that the government apparently accepted Agrod as the importer when Delmonico was the designated subdistributor."

The authority of *Sony* has not been challenged by any later decisions.

Petitioner respectfully submits that all contracts involved demonstrate arms-length transactions between the parties and are of economic substance.

Jon H. performed the vital function so necessary to successfully bring the fishing tackle into the United States, buying the fishing tackle from Denker, was liable for payment thereof, assuming all the risks of importation, none of which was shared or assumed by petitioner; caused it to be shipped into the United States, and made a varied profit instead of a fixed fee on the sale of the fishing tackle. All the documents of title were in Jon H. prior to the time the fishing tackle was unloaded at the dock in Los Angeles.

The District Court made substantially the same finding of fact as in *Sony* (Clk. Tr. No. 9, p. 161) and did look at the realities, contrary to the contention of the respondent, where it stated, at page 47, Vol. IV, R.T.:

> "and if anybody was inducing the importation, it was certainly Jon H. He was the one who wanted to build it up and Jon H. is the one that wanted to sell all that he could, and then get all he could

> from Denker, and then turn around and ask Corex how many did they want because they had the right of first refusal, and what he didn't want he would sell to anybody else."

Respondent had no objection to the findings of the District Court and, on oral argument before the Court of Appeals, admitted that findings of the District Court sustained its judgment.

The respondent, in its memorandum, completely overlooks Conclusion of Law No. 3, where it states:

> "The plaintiff did not, as principal, arrange for, induce, or cause, the taxable articles to be brought into a port of the United States with intent to unload. Neither did it actually import the taxable articles." (Clk. Tr. p. 163.)

This conclusion is adequately supported by the evidence, and the Court of Appeals cannot make new findings or draw ultimate inference therefrom.

See: *McAllister* v. *United States*,
348 U.S. 19, 20, 22, 23 (1954);
United States v. *United States Gypsum Co.*,
333 U. S. 364, 394 (1948).

Respondent refers to Rev. Rul. 67-209, 1967-1 Cum Bul. 297, stating that the Court of Appeals relied upon it in determining who was the importer. It is petitioner's information that a later ruling in the *Impeco* matter which sustains petitioner's position and, in effect, overrules 67-209. Although an effort has been made

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to obtain the ruling from the Revenue Service, it has not been made available.

For the reasons set forth in the petition for certiorari, and this reply, petitioner prays that its petition for a writ of certiorari be granted.

Rrespectfully submitted,

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